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NOMINATION OF THURGOOD MARSHALL

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Mr. Hart, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany the nomination of Thurgood Marshall]

The Committee on the Judiciary, to which was referred the nomination of Thurgood Marshall of New York to be an Associate Justice of the Supreme Court of the United States vice Associate Justice Tom C. Clark, retired, having considered the same, reports favorably thereon with the recommendation that the nomination be confirmed by the U.S. Senate.

The nominee twice before has been considered for Presidential nominations by this committee. In the history of the Senate there probably has never been any nominee for any judicial position who has received more minute and searching examination. The nominee's appearances before two subcommittees of the Judiciary Committee, and now the full Judiciary Committee have been most revealing. The very curtain of his soul has been parted, its full width opening to view his character, his philosophy, and the quality of his judicial temperament. This view, at this critical point in time, has shown Judge Marshall's unique qualifications to sit on the Nation's highest court and to enforce her laws and protect her Constitution fairly, fully, and faithfully. The committee after full consideration has recommended Judge Marshall for confirmation by a vote of 11–5.

The nominee is presently the Solicitor General of the United States, for which Office he was approved by the U.S. Senate 2 years ago.

Previously he served as U.S. circuit judge for the second circuit from October 5, 1961, to August 11, 1965. His distinguished career at the bar has been attested to by leading lawyers, jurists, and Members of the Congress.

While on the court of appeals, Judge Marshall participated in every type of case that comes before the Federal courts, in all more than 100.

The President of the United States has cited him "as a lawyer and a judge of very high ability, a patriot of deep convictions, and a gentleman of undisputed integrity."

In addition to this well-earned praise, Judge Marshall brings before us an impressive professional record of participation in the civic life of this Nation. In civil rights, his efforts have been marked by an exemplary and becoming patience and faith in our judicial system. He has been in the forefront of those who assisted America's Negro citizens in asserting their right to share in our common heritage and to realize their constitutional prerogatives, yet he has been in the forefront of those who insisted that this progress can and must be achieved within the framework of American democracy and of the law. Judge Marshall has earned and enjoys the respect of the legal profession beyond sectional and partisan limitations. Judge Marshall has been approved by the Committee on Judicial Appointments of the New York State Bar Association and the corresponding committee of the American Bar Association. Judge Marshall possesses a unique combination of experience as an appellate judge and a Supreme Court advocate for both private petitioners and the United States.

Prior to Judge Marshall's confirmation as a judge of the Second Circuit Court of Appeals and as Solicitor General of the United States, he was subjected to unprecedented attacks consisting of baseless allegations and outright malicious false charges. The overwhelming confirmation by the Senate in both instances and Judge Marshall's productive and skillful record as a U.S. circuit court judge and as Solicitor General of the United States should have dissolved any remaining fragment of these baseless charges and attempts to malign a great American.

It may be said that Judge Marshall both in private practice and in public office has demonstrated those qualities which we admire in members of our highest judicial tribunal: thoughtfulness, care, moderation, reasonableness, a judicial temperament, and a balanced approach to controversial and complicated national problems.

It will be a most historic occasion when the Senate confirms Thurgood Marshall as Associate Justice of the U.S. Supreme Court. History will be made not so much because we will be recommending the confirmation of the first member of the Supreme Court who is a Negro, but because we will be recommending the confirmation of a man who is uniquely qualified, and one might say perfectly prepared to become a Supreme Court Justice. Rarely in our history have we had a man who established a national reputation as a leading trial and appellate litigator, who then sat successfully on the Federal appellate bench and then served as the Government's chief appellate litigator in the office of Solicitor General. There can be no better preparation and qualification for the Supreme Court.

Judge Marshall is before the Senate for confirmation because he is an outstanding lawyer, judge and Solicitor General, not because he is a Negro; but we cannot ignore the fact of his race. His achievement is a sign of the progress we as a nation have attained in assuring all of our citizens equality of opportunity. Yet, at the same time his success highlights how far we have to go.

The opposition to the nomination turns on the allegation that Judge Marshall is too liberal in his philosophy and would upset the balance on the Court. Judge Marshall believes in the Constitution of the United States and the separation of powers. He deeply believes in and respects the oaths of office to which he has subscribed twice and to which he must subscribe again.

Judge Marshall's record and his testimony disclose that he believes that the Constitution of the United States is a living document which the Supreme Court is required to interpret in each case according to the facts presented to it. He believes that every petitioner is entitled to the most competent and informed decision a judge can make at the time the facts of that particular case are presented to him. He believes that our system of justice is not so unenlightened as to require that, in attaching present consequences to past occurrences, a judge must ignore all of the insight that man has learned in the law and through observance of human behavior through the years.

Certain criticisms of Judge Marshall arise from the fact that he wisely and forthrightly declined to give a judicial opinion on hypothetical questions. When Justice Fortas appeared before this committee and was asked hypothetical questions, the committee said:

> We have always felt it would be unfair to ask any nominee for any judicial office to give a legal opinion on the basis of a hypothetical question.

Obviously, if a question of this type arose before Judge Marshall, it would be well briefed; it would be elaborately researched; and it would be argued at great length. Judge Marshall's declining to answer such hypothetical questions was the only course of action open to him.

One of the members of the minority conducted elaborate questioning as to the most esoteric details of the legislative history underlying the adoption of the 13th, 14th, and 15th amendments. Answer to these questions would have required any lawyer, even one quite familiar with the general background of the reconstruction amendments, to reread a most voluminous history. Judge Marshall properly responded with caution, acknowledging that such research would be required before an answer to many of these questions could be ventured. In view of his distinguished success before the Supreme Court of the United States in numerous cases involving the application of these amendments, his qualifications in this area of the law can scarcely be doubted.

Objection has been raised to the nomination on the ground that Judge Marshall was so closely identified with the National Association for the Advancement of Colored People for so many years. We cannot see how this professional connection, formally severed some 7 years ago, can disqualify an otherwise qualified judicial nominee any more than prior connections with corporations, law firms, and labor unions could have disqualified prior nominees. Moreover, this particular association redounds to Judge Marshall's and now the Nation's benefit. For as director-counselor of the NAACP legal defense and education fund for so many years, his extraordinary legal ability was honed and proven in courts of every land.

The Senate will do itself honor, the Court will be graced, and the Nation benefited by our confirmation of this nominee to the Supreme Court.

The majority of the Committee on the Judiciary, therefore, considering the nomination of Thurgood Marshall to be Associate Justice of the Supreme Court of the United States, takes special pleasure in reporting said nomination favorably and recommends the nominee's confirmation by the U.S. Senate.

THOMAS J. DODD.
PHILIP A. HART.
EDWARD V. LONG.
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MINORITY VIEWS OF MR. ERVIN

The good and wise men who fashioned the Constitution had earth's most magnificent dream.

They dreamed they could enshrine the fundamentals of the government they desired to establish and the liberties of the people they wished to secure in the Constitution, and safely entrust the interpretation of that instrument according to its true intent to a Supreme Court composed of mere men.

They knew that some dreams come true and others vanish, and that whether their dream would share the one fate or the other would depend on whether the men chosen to serve as Supreme Court Justices would be able and willing to lay aside their own notions and interpret the Constitution according to its true intent.

They did three things to make their dream come true.

They decreed that Supreme Court Justices should be carefully chosen. To this end, they provided that no man should be elevated to the Supreme Court until his qualifications for the office had been twice scrutinized and approved, once by the President and again by the Senate.

They undertook to free Supreme Court Justices from all the personal, political, and economic ambitions, fears, and pressures which harass the occupants of other public offices by stipulating that they should hold office for life and receive for their service a compensation which no authority on earth could reduce.

They undertook to impose upon each Supreme Court Justice a personal obligation to interpret the Constitution according to its true intent by requiring him to take an oath or make an affirmation to support the Constitution.

It is no exaggeration to say that the existence of constitutional government in America hinges upon the capacity and willingness of a majority of the Supreme Court Justices to interpret the Constitution according to its true intent. In consequence, no more awesome responsibility rests upon any Senator than that of determining to his own satisfaction whether or not a Presidential nominee to the Supreme Court possesses this capacity and this willingness.

In expressing my views concerning the President's nomination of Judge Thurgood Marshall to be a Supreme Court Justice, I shall ignore these words of advice which were reputedly spoken by Mark Twain: "Truth is precious; use it sparingly."

I shall tell some fundamental truths about the Constitution and some tragic truths about the Supreme Court as it is now constituted. Moreover, I shall state with candor the basis for my sincere conviction that the addition of Judge Marshall to that Court would bode little good for constitutional government in the United States.

I know that in so doing I lay myself open to the easy, but false, charge that I am a racist. I have no prejudice in my mind or heart against any man because of his race. I love men of all races. After all, they are my fellow travelers to the tomb.

But I also love the Constitution. I know that apart from its faithful observance by Congress, the President, and the Supreme Court, neither our country nor any single human being within its borders has any security against anarchy or tyranny.

For this reason I will not let any false charge or any other consideration deter me from my abiding purpose to do everything within my limited power to save the Constitution for all Americans of all generations.

The good and wise men who wrote and ratified the Constitution knew the everlasting truth subsequently phrased by Daniel Webster in this way: "Whatever government is not a government of laws is a despotism, let it be called what it may."

In consequence, they fashioned the Constitution to secure to all Americans of all generations the right to be ruled by a government of laws rather than by a government of men.

To this end, they granted enumerated powers to the Federal Government and allotted or reserved all other powers to the States or the people. They established the legislative, the executive, and the judicial departments of the Federal Government, and distributed among them all the powers they granted to the Federal Government to prevent the accumulation of those powers in the same hands.

In so doing, they assigned the power to make laws consistent with the Constitution to the Congress, the power to enforce the Constitution and the laws enacted by Congress to the President, and the power to interpret the Constitution and the laws enacted by Congress to the Supreme Court and the Federal courts inferior to it.

They knew that useful alterations of the Constitution would be suggested by experience. Consequently, they made provision for amendment in one way, and one way only, i.e., by the concurrence of Congress and the States, as set forth in article V.

They inserted in article VI the requirement that all legislators, all executive officers, and all judges, Federal and State, "shall be bound by oath or affirmation to support this Constitution." By this requirement, they clearly meant to impose upon all occupants of Federal and State offices the absolute obligation to perform their official duties in conformity with the intent of those who framed and ratified the Constitution as expressed in that instrument.

These things make this conclusion obvious: The Founding Fathers intended that the Constitution should operate as an enduring instrument of government whose meaning could not be changed except by an amendment made by Congress and the States in conformity with article V.

Any contention to the contrary is necessarily founded on the assumption that George Washington and the other good and wise men who fashioned the Constitution were mendacious nitwits who did not mean what they said. Chief Justice John Marshall undertook to entomb any such contention forever in his great opinion in *Gibbons* v. *Ogden*, 22 U.S. 1, when he declared: "The enlightened patriots who framed our Constitution and the people who ratified it must be understood * * * to have intended what they said."

The power to interpret the Constitution, which is assigned to the Supreme Court, and the power to amend the Constitution, which is vested in Congress and the States acting concurrently, are vastly different. The power to interpret the Constitution is the power to

ascertain its meaning, and the power to amend the Constitution is the power to change its meaning. Justice Benjamin N. Cardozo put the distinction between the two powers tersely when he said: "We are not at liberty to revise while professing to construe."

Since it is a judicial tribunal, the Supreme Court acts as the interpreter of the Constitution only in a litigated case whose decision of necessity turns on some provision of that instrument. As a consequence, the function of the Supreme Court in the case is simply to ascertain and give effect to the intent of those who framed and ratified the provision in issue. If the provision is plain, the Court must gather the intent solely from its language; but if the provision is ambiguous, the Court must place itself as nearly as possible in the condition of those who framed and ratified it, and in that way determine the intent the language was used to express. For these reasons, the Supreme Court is obligated to interpret the Constitution according to its language and history.

Inasmuch as the true meaning of a provision of the Constitution always remains the same unless it is altered by an amendment under article V, it should receive a consistent interpretation, and not be held to mean one thing at one time and another thing at another time, even though circumstances may have so changed as to make a different rule seem desirable.

These considerations moved Judge Thomas M. Cooley to declare in his great work on "Constitutional Limitations" that—

> A court or a legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty.

While it contains a system of checks and balances to keep Congress and the President within their constitutional bounds, the Constitution does not have within itself a single positive provision other than the requirement of an oath or affirmation to safeguard the country against the danger that the Supreme Court might abuse its power to interpret the Constitution, and amend the instrument while professing to interpret it.

Chief Justice Harlan F. Stone had this omission in mind when he stated this truth concerning Supreme Court Justices:

> While unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self restraint (*U.S.* v. *Butler*, 297 U.S. 1).

The omission of the Constitution to provide any real check upon unconstitutional behavior on the part of the Supreme Court was not overlooked during the contest over ratification.

Elbridge Gerry, George Mason, and others urged this omission as a ground for refusing ratification. They declared, in substance, that under the Constitution the decisions of the Supreme Court of the United States would "not be in any manner subject to * * * revision or correction"; that "the power of construing the laws" would enable the Supreme Court of the United States "to mould them into whatever shape it" should "think proper"; that the Supreme Court of the United States could "substitute" its "own pleasure" for the law of the land;

and that the "errors and usurpations of the Supreme Court of the United States" would "be uncontrollable and remediless."

Alexander Hamilton overcame these arguments, however, to the satisfaction of the ratifying States by giving them this emphatic assurance: "The supposed danger of Judiciary encroachments * * * is, in reality a Phantom." He declared, in essence, that this was true because the men selected to serve as Supreme Court Justices would "be chosen with a view to those qualifications which fit men for the stations of Judges" and that they would give "that inflexible and uniform adherence" to legal precedents and rules, which is "indispensable in the courts of justice." He added that these qualifications could be acquired only by "long and laborious study" (Hamilton: The Federalist, Nos. 78, 81)

By these statements Alexander Hamilton correctly declared that that no man is qualified to be a judge unless he is able and willing to subject himself to the self-restraint, which is an essential ingredient of the judicial process in a government of laws.

Self-restraint is the capacity and the willingness of the qualified occupant of a judicial office to lay aside his personal notions of what a constitutional provision ought to say and to base his interpretation of its meaning solely upon its language and history. In performing his task he does not recklessly cast into the judicial garbage can the sound precedents of his wise predecessors.

This self-restraint is usually the product of long and laborious legal work as a practicing attorney or long and laborious judicial work as a judge of an appellate court or a trial court of general jurisdiction. It is sometimes the product of long and laborious work as a teacher of law.

One does not come into possession of self-restraint, however, by occupying executive or legislative offices, or by rendering aid to a political party, or by maintaining a friendly relationship with a President, or by adhering to a particular religion, or by belonging to a particular race. And, unhappily, some men of brilliant intellect and good intentions seem incapable of acquiring it or unwilling to exercise it. Daniel Webster undoubtedly had these men in mind when he said:

> Good intentions will always be pleaded for every assumption of power * * * It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

I have discussed in detail the sound doctrine that self-restraint on the part of judges is an essential ingredient of the judicial process in a government of laws.

This inquiry naturally arises: Why is this so? This inquiry is especially pertinent at a time when judicial activists declare by their actions, if not by their words, that it is permissible for them to revise or update the Constitution according to their personal notions while they are professing merely to interpret it.

Justice Cardozo answered this inquiry tersely and conclusively in his illuminating book on the "Nature of the Judicial Process." In demolishing the basic premise of judicial activists that the judge is always privileged to substitute his individual sense of justice for rules of law, Justice Cardozo said:

> That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.

For several generations, the people of America had no reason to doubt Alexander Hamilton's assurance concerning the kind of men who would be selected to sit upon the Supreme Court. With rare exceptions, Presidents appointed to the Court men who had long and laboriously participated in the administration of justice either as practicing lawyers or as judges of State courts or as judges of Federal courts inferior to the Supreme Court, and who possessed and exercised the self-restraint which constitutes an essential ingredient of the judicial process in a government of laws. As a consequence, they performed their judicial labors in obedience to the principle that it is the duty of Supreme Court Justices to interpret the Constitution, not to amend it.

Candor compels me to say, however, that these things are no longer true, and that a substantial number of recent appointees to the Supreme Court are judicial activists who seek to rewrite the Constitution in their own images by adding to that instrument things which are not in it and by subtracting from that instrument things which are in it.

I shall not make any dogmatic assertion as to why this is so. But I will have the temerity to suggest that too many political appointments have been made of late to these judicial offices.

The tragic truth is that in recent years, the Supreme Court has repeatedly usurped and exercised the power of Congress and the States to amend the Constitution while professing to interpret it.

On some occasions it has encroached upon the constitutional powers of the Congress as the Nation's legislative body. On other occasions it has stretched the legislative powers of Congress far beyond their constitutional limits. On occasions too numerous to mention, it has struck down State action and State legislation in areas clearly committed by the Constitution to the States.

In so doing, the Supreme Court has overruled, repudiated, or ignored many precedents of earlier years. Its prodigality in overruling previous decisions prompted one of its recent members, the late Justice Owen J. Roberts, to make this comment in his dissenting opinion in *Smith* v. *Allwright*, 321 U.S. 649, 669:

> The reason for my concern is that the instant decision, overruling that announced about 9 years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.

A study of the decisions invalidating State action and State legislation compels the conclusion that some Supreme Court Justices now deem themselves to be the final and infallible supervisors of the desirability or wisdom of all State action and all State legislation.

This is tragic, indeed, because there is nothing truer than the belief attributed to the late Justice Louis D. Brandeis by Judge Learned Hand that "the States are the only breakwater against the ever pounding surf which threatens to submerge the individual and destroy the only kind of society in which personality can survive."

For some reason too deep to fathom, the Supreme Court, as now constituted, has a solicitude for persons charged with crime which

blinds it to the truth that society and the victims of crime are as much entitled to justice as the accused.

It has manifested this solicitude in many ways. It repeatedly overrules State courts in criminal cases simply because it dislikes their appraisal of facts on conflicting evidence. It sanctions a practice by which the lowest courts in the Federal judicial system, i.e., the district courts, frequently set at naught the decisions of the highest courts of the State in criminal cases, even in instances where the Supreme Court itself has refused to grant certiorari to review the State cases. And during the past 15 months it has created new artificial and unrealistic rules in the *Miranda* case (384 U.S. 346), and the *Gilbert*, the *Wade*, and the *Stovall* cases, which seriously handicap society in its efforts to protect itself against crime and to bring lawbreakers to justice.

In saying these things, I am not a lone voice crying in a constitutional wilderness. Supreme Court Justices, judges of Federal courts inferior to the Supreme Court, State judges, lawyers, and writers on legal subjects have charged on occasions beyond numbering that during recent years a majority of the Supreme Court has repeatedly rendered decisions incompatible with the language and history of the Constitution.

I quote words used by the late Justice Robert H. Jackson in his concurring opinion in *Brown* v. *Allen*, 344 U.S. 643:

> Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

A most illuminating document on this subject is a resolution which was adopted by the chief justices of the States of Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming, at Pasadena, Calif., on August 23, 1958.

This resolution is an astounding document without precedent in the annals of our country. The 36 State chief justices who adopted it loved the Constitution and were qualified by legal learning and judicial experience to appraise aright what the judicial activists on the Supreme Court are doing to the system of government that instrument was ordained to establish. In this resolution, these State chief justices cited many recent decisions of the Supreme Court inconsistent with the powers allotted or reserved by the Constitution to the States, and implored the Supreme Court to

> exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect

> to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

To enable the Senate to make its own appraisal of this resolution, I attach a copy of it to this statement.

These things mean little or nothing to those who would as soon have our country ruled by the arbitrary, uncertain, and inconstant wills of judges as by the certain and constant precepts of the Constitution. But they mean everything to those of us who love the Constitution and believe it evil to twist its precepts out of shape even to accomplish ends which may be desirable.

If desirable ends are not attainable under the Constitution as written, they should be attained in a forthright manner by an amendment under article V and not by judicial alchemy which transmutes words into things they do not say. Otherwise, the Constitution is a meaningless scrap of paper.

I cannot forbear comment on the cliches of those who champion or seek to justify the action of the judicial activists who amend the Constitution while professing to interpret it. They assert with glibness that the Constitution is a living document which the Court must interpret with flexibility.

When they say the Constitution is a living document, they really mean that the Constitution is dead, and that activist Justices as its executors may dispose of its remains as they please. I make an additional observation on this subject: If the Constitution is, indeed, a living document, its words are binding on those who pledge themselves by oath or affirmation to support it.

What of the cliche that the Supreme Court should interpret the Constitution with flexibility? If those who employ this cliche meant by it that a provision of the Constitution should be interpreted with liberality to accomplish its intended purpose, they would find me in hearty agreement with them. But they do not employ the cliche to mean this. On the contrary, they use the cliche to mean that the Supreme Court should bend the words of a constitutional provision to one side or the other to accomplish an object the provision does not sanction. Hence, they use the cliche to thwart what the Founding Fathers had in mind when they fashioned the Constitution.

The genius of the Constitution is this: The grants of power it makes and the limitations it imposes are inflexible, but the powers it grants extend into the future and are exercisable on all occasions by the departments in which they are vested. In consequence, Congress may change at any time the laws governing any matter the Constitution commits to the Federal Government. Like observations apply to the powers the Constitution allots or reserves to the States.

In commenting upon the recent action of the Supreme Court, I have been conscious of the inadequacy of language. I have necessarily used the term "Supreme Court" or the term "Supreme Court Justices" to signify members of the Court who were responsible for the decisions incompatible with the language and history of the Constitution. I have not overlooked the fact, however, that most of these decisions were handed down by a sharply divided Court, and that in many of

them there were strong dissents by some of the Justices who asserted in no uncertain terms that the majority decisions were contrary to the Constitution.

What has been said makes these things as clear as the noonday sun in a cloudless sky:

1. Apart from faithful observance of the Constitution by Congress, the President, and the Supreme Court, neither our country nor any human being within its borders has any security against anarchy or tyranny.

2. The Supreme Court can compel Congress and the President to observe the Constitution. But no authority external to themselves can compel Supreme Court Justices to observe their constitutional obligation to base their interpretation of the Constitution upon its language and history.

3. It is idle to suggest that Congress and the States can redress the consequences of judicial usurpations by exercising their power to amend the Constitution. In the first place, the Constitution cannot be amended fast enough to redress the consequences of wholesale judicial usurpations; and in the second place, it is absurd to expect that Supreme Court Justices who do not observe the language and history of existing constitutional provisions will abide by the language and history of newly adopted amendments.

4. This being true, the only restraint on unconstitutional behavior on the part of Supreme Court Justices is their own sense of self-restraint.

5. No matter how great his qualifications in other respects may be, no man is fit to be a Supreme Court Justice if he lacks a sense of self-restraint or is unwilling to exercise it. The presence of such Justices on the Supreme Court imperils our most precious right—the right to be governed by the Constitution. They are invariably judicial activists, who seek to rewrite the Constitution according to their personal notions while professing to interpret and love it. Unlike the foreign conqueror, they do not rob us of our rights in one fell swoop. No. They nibble them away one by one and case by case. But the end result is the same: The destruction of constitutional government. In his farewell address to the American people, George Washington warned us not to travel the road which the judicial activists would have us take. He said:

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates * * *. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.

6. This is no time to add another judicial activist to the Supreme Court. The Court, as now constituted, has already taken us a long way down the road which George Washington told us not to travel. As a consequence, words of the Constitution no longer mean what they have always meant, history and precedents are disregarded,

and decisions on crucial constitutional questions are based on personal notions which a majority of the Justices happen to share from time to time.

I shall now apply what I have said to the question: Should the Senate advise and consent to the President's nomination of Judge Thurgood Marshall to be a Supreme Court Justice?

It is clearly a disservice to the Constitution and the country to appoint a judicial activist to the Supreme Court at any time. The present composition of the Supreme Court renders the gravity of such disservice greater today than it has ever been.

In consequence of these considerations, my duty to my country compels me to vote to reject any Presidential nominee for a Supreme Court justiceship if I have reason to believe he would be a judicial activist, who would seek to add to the Constitution things which are not in it or to subtract from the Constitutions things which are in it.

Our want of clairvoyance disables us to view in advance the future behavior of another. In the nature of things, we are compelled to judge what another's future behavior will be by his past conduct and the philosophy it reflects. This being true, it is folly to assume that a Supreme Court Justice will put off his practices and philosophy of a lifetime when he puts on his judicial robes.

In a sincere effort to be fair to the nominee and faithful to my country, I have diligently studied and seriously considered Judge Marshall's past activities as a lawyer and circuit judge and the philosophy those activities reflect, and have been impelled by them to this conclusion: Judge Marshall is by practice and philosophy a legal and judicial activist, and if he is elevated to the Supreme Court, he will join other activist Justices in rendering decisions which will substantially impair, if not destroy, the right of Americans for years to come to have the Government of the United States and the several States conducted in accordance with the Constitution.

It is not strange that Judge Marshall should be a legal and judicial activist. Indeed, it would be little short of miraculous if he were not.

His activities as a practicing lawyer were calculated to make any man a constitutional iconoclast.

For years he devoted virtually all his efforts to the trial of cases in which he sought to persuade courts to attribute to the 14th and 15th amendments new meanings incompatible with the intent of those who fashioned their provisions. In so doing, he urged the courts to repudiate or ignore all history and all precedents which stood in the way of the rulings he desired.

Judge Marshall argued some of these cases with singular success before the Supreme Court, which repudiated or ignored the history of the 14th and 15th amendments, overruled or misconstrued or ignored former decisions interpreting the amendments in accord with the purpose of those who framed and ratified them, and attributed to the amendments new meanings implementing the notions of its members.

The cases in which the Supreme Court took this action are fairly familiar, and for this reason I omit any detailed discussion of them.

When he abandoned the practice of law for the post of judge of the U.S. court of appeals for the fourth circuit, Judge Marshall carried his philosophy as a constitutional iconoclast to the bench.

As a member of the court of appeals, Judge Marshall made these things manifest:

1. He accepts the thesis that the due process clause of the 14th amendment makes Supreme Court Justices and other Federal judges day-to-day Constitutionmakers, and empowers them to strike down as unconstitutional any State law, procedure, or practice inconsistent with their undefined notions of decency, fairness, and fundamental justice.

2. When "misty ideals collide with the grim realities of law enforcement," his solicitude for the accused aligns him with the judicial activists who create without constitutional warrant so-called constitutional rules of criminal procedures which handicap society in its struggle to protect law-abiding people against crime and to bring lawbreakers to justice.

The validity of these conclusions in demonstrated by *United States* v. *Wilkins* (348 F. 2d 844) where Judge Marshall undertook to apply the fifth amendment's guarantee against double jeopardy to State criminal cases, despite contrary rulings by the Supreme Court itself; and *United States* v. *Denno*, an unreported case, in which a panel of the Second Circuit Court consisting of Judge Marshall and Judge Friendly undertook to establish a new exclusionary rule allegedly based on the right-to-counsel clause of the sixth amendment, which was without support in the language of the clause and which was contrary to rulings and practices throughout the United States during the preceding 175 years.

Judge Marshall concurred in Judge Friendly's decision in the *Denno* case that the right-to-counsel clause of the sixth amendment had suddenly acquired a new meaning, and that by virtue thereof it was unconstitutional for the eyewitness of a crime, who happened also to be one of its victims, to look at a suspect in custody with a view to identifying or disavowing him as the perpetrator of the crime unless an attorney representing the suspect was present.

The noval holding of this panel evidently outraged the majority of the judges of the Second Circuit, who met en banc and reversed this ruling by a decision reported in 355 F. 2d 731.

The Supreme Court subsequently reviewed the *Denno* case under the title *Stovall* v. *Denno*. The Court handed down its decision in the case on June 12, 1967, the same day on which it announced the Constitution-amending decisions in *United States* v. *Wade* and *Gilbert* v. *California*.

By the *Wade* and *Gilbert* cases, the Supreme Court decreed by a vote of 5 to 4 that subsequent to June 12, 1967, the right-to-counsel clause of the sixth amendment must be interpreted by all courts, Federal and State, to forbid the eyewitness to any crime, even though he may be its sole surviving victim, to look at any suspect in custody for identification purposes in the absence of an attorney representing the suspect.

Although it thus adopted a new constitutional concept initially conceived by Judge Marshall and Judge Friendly in the *Denno* case, the Supreme Court affirmed the result of the ruling of the circuit court sitting en banc, which rejected that concept, on the paradoxical ground that words, which had been in the Constitution since June 15, 1790, meant one thing before June 12, 1967, and another thing thereafter.

The fact that the Justices sitting in the *Wade* and *Gilbert* cases approved and implemented by a bare majority of one Judge Marshall's

views in respect to the right-to-counsel clause of the sixth amendment emphasizes the unwisdom of adding him to the Court as it is now constituted.

This is so because it enhances the probability that if he becomes a Justice, the Supreme Court will be manned for years to come by a cohering majority of judicial activists who distrust human testimony and for that reason invent new artificial and unrealistic rules to restrict the right of society to present and the opportunity of the jury to hear and consider in both Federal and State criminal proceedings the most reliable human testimony; i.e., the voluntary confession of the accused that he committed the crime with which he stands charged, and the testimony of the eyewitness that he saw the accused commit the crime with which he stands charged.

This probability is not lessened a whit by words attributed to Judge Marshall while serving as Solicitor General which indicate that he thinks society should not be permitted to employ to protect itself the devices which criminals employ to prey on society.

The Senate Judiciary Committee conducted hearings on the Marshall nomination. On those hearings, members of the committee put to Judge Marshall questions designed to elicit from him his philosophy of the Constitution. He was understandably reluctant to answer many of those questions.

Nevertheless, his answers to some of them did implant in my mind the indelible impression that he endorses and approves the drastic canon of interpretation invented by some of the Justices in *South Carolina* v. *Katzenbach* (383 U.S. 301), *U.S.* v. *Guest* (383 U.S. 745), and *Katzenbach* v. *Morgan* (384 U.S. 641), which is without parallel in our judicial annals.

This canon of interpretation belies the essential principle that all provisions of the Constitution are of equal dignity and none must be so interpreted as to nullify or impair the others. Instead of interpreting the Constitution as a harmonious instrument in these cases, however, the Court views it as a self-destructive document consisting of mutually repugnant provisions of unequal dignity. By so doing, the Court reaches the astounding conclusion that section 5 of the 14th amendment and section 2 of the 15th amendment authorize Congress to do these things: First, to nullify constitutional powers clearly allotted or reserved to the States by article I, and article II, the 10th amendment and the 17th amendment; and, second, to pass congressional acts which the provisions allotting or reserving those constitutional powers to the States and the substantive provisions of the 14th amendment forbid it to enact.

This method of interpretation, which sanctions the use of one provision of the Constitution to nullify other provisions, may be pleasing to judicial activists. It bodes ill, however, for the future of constitutional government because it sanctions a method by which Congress can transfer to a centralized National Government the powers the Constitution allots or reserves to the States.

It brings consternation to those of us who believe that Woodrow Wilson spoke truly when he said:

> Liberty has never come from the Government. Liberty has always come from the subjects of it. The history of liberty is a history of the limitation of governmental power, not the

> increase of it. When we resist therefore the concentration of power, we are resisting the processes of death, because concentration of power is what always precedes the destruction of human liberties.

My conclusion that if he becomes a Supreme Court Justice, Judge Marshall will align himself with the judicial activists now serving on the Supreme Court is shared by eminent commentators on the national scene. To corroborate this statement, I offer this documentary evidence:

1. An editorial from the Washington Star of June 14, 1967, entitled "Dr. King's Conviction."
2. An editorial from the Washington Star of June 15, 1967, entitled "Mr. Marshall's Nomination."
3. An article by Dana Bullen from the Washington Star of July 21, 1967, entitled "Marshall Leaves Questions Open."
4. An article by Clayton Fritchey from the Washington Star of June 23, 1967, entitled "Marshall Appointment to Court Greeted Quietly."
5. An article by James J. Kilpatrick from the Washington Star of June 18, 1967, entitled "Marshall's Appointment Upsets Court Balance."
6. An article by David Lawrence from the Washington Star of June 16, 1967, entitled "Why Not a Woman on High Court?"
7. An article by William S. White from the Washington Post of June 19, 1967, entitled "Marshall to the Court. Can Moderation Survive?"

I wish to make emphatic a statement in William S. White's article of June 19, 1967, which declares in a nutshell what I have been trying to say with a multitude of words. I quote Mr. White:

> Still, the probabilities of the future can only be rationally estimated by the known and certain past. By this standard it is likely that Marshall's elevation will only aggravate an already profound imbalance by which an already disproportionate majority of liberal Justices has for years been acting not as detached arbiters but as lawmakers, not as interpreters of the Constitution but as amenders of that Constitution to suit their own notions.

I love the Constitution. I love the Constitution with all my mind and all my heart. I love the Constitution with all my mind and all my heart because I know it was fashioned to secure to all Americans of all generations the right to be ruled by a government of laws rather than by a government of men.

I know, moreover, that apart from the faithful observance of the precepts of the Constitution by the Congress, the President, and the Supreme Court, neither our country nor any single human being within its farflung borders has any security against anarchy on the one hand and tyranny on the other.

I have considered with dilligence, and I believe with objectivity, the career of Judge Marshall and the philosophy its reflects, and I have been driven by my consideration of these things to the abiding conviction that Judge Marshall is by practice and philosophy a constitutional iconoclast, and that his elevation to the Supreme Court at this juncture of our history would make it virtually certain

that for years to come, if not forever, the American people will be ruled by the arbitrary notions of Supreme Court Justices rather than by the precepts of the Constitution. I use the words "if not forever" deliberately because history teaches that a right once lost is seldom regained. For these reasons, my duty to my country forbids me to advise and consent to Judge Marshall's appointment to the Supreme Court.

I love the Constitution. I love the Constitution with all my mind and all my heart. I am convinced that a great Senator, Daniel Webster, who also loved the Constitution with all his mind and all his heart, spoke tragic truth when he said these things 135 years ago:

> Other misfortunes may be borne, or their effects overcome. If disastrous wars should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests.
>
> It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these may be rebuilt.
>
> But who shall reconstruct the fabric of demolished government?
>
> Who shall rear again the well-proportioned columns of constitutional liberty?
>
> Who shall frame together the skillful architecture which unites national sovereignty with State Rights, individual security, and Public prosperity?
>
> No, if these columns fall, they will be raised not again. Like the Colosseum and the Parthenon, they will be destined to a mournful and melancholy immortality. Bitterer tears, however, will flow over them than ever were shed over the monuments of Roman or Grecian art; for they will be the monuments of a more glorious edifice than Greece or Rome ever saw—the edifice of constitutional American liberty.

SAM J. ERVIN, JR.

APPENDIX TO MR. ERVIN'S VIEWS

[From the U.S. News & World Report, Oct. 3, 1958]

WHAT 36 STATE CHIEF JUSTICES SAID ABOUT THE SUPREME COURT—FOR THE FIRST TIME, HERE IS FULL TEXT OF HISTORIC REPORT

The chief justices of 36 States recently adopted a report critical of the Supreme Court of the United States, declaring that the Court "has tended to adopt the role of policy maker without proper judicial restraint."

This report, approved by the chief justices of three fourths of the nation's States, found that the present Supreme Court has abused the power given to it by the Constitution. The Court is pictured as invading fields of Government reserved by the Constitution to the States.

Full text of this historic document has not previously been given wide distribution. It is printed below, together with the formal resolution of approval by the Conference of State Chief Justices.

The Conference of Chief Justices, meeting in Pasadena, Calif., on Aug. 23, 1958, adopted a resolution submitted by its Committee on Federal-State Relationships as Affected by Judicial Decisions. Vote on the resolution was 36 to 8, with 2 members abstaining and 4 not present. Text of the resolution:

Resolved:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That, in the field of federal-State relationships, the division of powers between those granted to the National Government and those reserved to the State Governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our National Government and control of matters primarily of local concern is reserved to the several States, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written Constitution is to promote the certainty and stability of the provisions of law set forth in such a Constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent

of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

Following is full text of the Committee's report as approved by the State chief justices:

FOREWORD

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly rese .rch and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School, several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts," by Professor Kurland.;

2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty," by Assistant Professor [Roger C.] Cramton;

3. "Congress, the States and Commerce," by Professor Allison Dunham;

4. "The Supreme Court, Federalism, and State Systems of Criminal Justice," by Professor Francis A. Allen; and

5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive mono graphs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized.

The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either.

We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication.

Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

BACKGROUND AND PERSPECTIVE

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-State relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of good practical importance as affecting federal-State relationships are the rulings and actions of federal administrative bodies. These include the independent-agency regulatory bodies, such as the Inter-

state Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board.

Many important administrative powers are exercised by the several departments of the executive branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-State relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between federal legislation and administrative action on the one hand and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist and, if so, in what form is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and State governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court—even though we are bound by them—or when we see trends in decisions of that Court which we think will lead to unfortunate results.

We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our State courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

PROBLEMS OF FEDERALISM

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of

our national Constitution acted in outlining the division of powers between the national and State governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by De Tocqueville [Alexis de Tocqueville, author of "Democracy in America"]. Under his summary of the Federal Constitution he says:

"The first question which awaited the Americans was so to divide the sovereignty that each of the different States which compose the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption, the "Federalist"—No. 45—discussed the division of sovereignty between the Union and the States and said:

"The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist," of course, are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and State governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original States and the governments of those States after the Revolution.

Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the States. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

Local Government: "a Vital Force"

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt [of the New Jersey Supreme Court], on the division of powers between the national and State governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present-Day Significance"—are persuasive.

He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British Government with this sentence:

"As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several States indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means toward an end; and that the horizontal distribution or allocation of powers between national and State governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the Federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

TWO MAJOR DEVELOPMENTS IN THE FEDERAL SYSTEM

The outstanding development in federal-State relations since the adoption of the National Constitution has been the expansion of the power of National Government and the consequent contraction of the powers of the State governments. To a large extent this is wholly unavoidable and, indeed, is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production.

On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of States. The Supreme Court of a bygone day said in *Texas* v. *White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the National Government has been the development of the immense power of the Supreme Court in both State and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy making.

Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But, if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even it is discounted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have.

As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on *"Stare Decisis"* [to stand by decided matters], 49 Columbia Law Review 735.

SOURCES OF NATIONAL POWER

Most of the powers of the National Government were set forth in the original Constitution; some have been added since. In the days of Chief Justice Marshall, the supremacy clause of the Federal Constitution and a broad construction of the powers granted to the National Government were fully developed and, as a part of this development, the extent of national control over interstate commerce became very firmly established.

The trends established in those days have never ceased to operate and, in comparatively recent years, have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint, the increase in federal revenues resulting from the Sixteenth Amendment—the income tax amendment—has been of great importance. National control over State action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-State relationships.

THE GENERAL WELFARE CLAUSE

One provision of the Federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general-welfare clause. In United States v. Butler, 297 U.S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general-welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare.

The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See Steward Machine Co. v. Davis, 301 U.S. 548, and Helvering v.

Davis, 301 U.S. 690. In those cases the Social Security Act was upheld and the general-welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

GRANTS-IN-AID

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report.

Perhaps we should also observe that, since the decision of Massachusetts v. Mellon, 262 U.S. 447, there seems to be no effective way in which either a State or an individual can challenge the validity of a federal grant-in-aid.

DOCTRINE OF PRE-EMPTION

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause.

More recently the doctrine has been applied in other fields, notably in the case of Commonwealth of Pennsylvania v. Nelson, in which the Smith Act and other federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania antisubversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

LABOR-RELATIONS CASES

In connection with commerce-clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created—depending upon how one looks at the matter—by the Supreme Court's decision in Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, which overturned a State statute aimed at preventing strikes and lockouts in public utilities. This decision left the States powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] State."

In two cases decided on May 28, 1951, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a State court was upheld. In International Association of Machinists v. Gonzales, a union member was held entitled to maintain a suit against

his union for damages for wrongful expulsion. In International Union, United Auto, etc. Workers v. Russell, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that, at the present time, there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of Textile Union v. Lincoln Mills, 353 U.S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor-Management Relations Act of 1947.

Paragraph (a) of that section provides: "Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Paragraph (b) of the same section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdicional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective-bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective-bargaining agreements.

What a State court is to do if confronted with a case similar to the Lincoln Mills case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains: Where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a State court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by State law, or is it limited to those which would be available under federal law if the suit were in a federal court?

It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the federal law and committed solely to the jurisdiction of the federal courts, so that the State courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor-Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between State and federal governments.

As he points out, much of this confusion is due to the fact that Congress has not made clear what functions the States may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which State action is clearly permissible. That is where actual violence is involved in a labor dispute.

STATE LAW IN DIVERSITY CASES

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the States or the effect of State laws. The celebrated case of Erie R.R. v. Tompkins, 304 U.S. 64, overruled Swift v. Tyson and established substantive State law, decisional as well as statutory, as controlling in diversity [of citizenship] cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

IN-PERSONAM JURISDICTION OVER NONRESIDENTS

Also, in cases involving the in-personam [against the person] jurisdiction of State courts over nonresidents, the Supreme Court has tended to relax rather than tighten restrictions under the due-process clause upon State action in this field. International Shoe Co. v. Washington, 326 U.S. 310, is probably the most significant case in this development.

In sustaining the jurisdiction of a Washington court to render a judgment in personam against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now-familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there."

Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including McGee v. International Life Insurance Co., 355 U.S. 220, until halted by Hanson v. Denckla, 357 U.S. decided June 23, 1958.

TAXATION

In the field of taxation, the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street. In recent years, cases involving State taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a State has sought to tax a contractor doing business with the National Government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years toward the validity of State taxation than it formerly took.

OTHER FOURTEENTH AMENDMENT CASES

In many other fields, however, the Fourteenth Amendment has been invoked to cut down State action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State antisubversive acts have been practically eliminated by Pennsylvania v. Nelson, in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

THE SWEEZY CASE—STATE LEGISLATIVE INVESTIGATION

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in Sweezy v. New Hampshire, 354 U.S. 234.

In that case, the State of New Hampshire had enacted a subversive-activity statute which imposed various disabilities on subversive persons and subversive organizations. In 1953, the legislature adopted a resolution under which it constituted the attorney general a one-man legislative committee to investigate violations of that act and to recommend additional legislation.

Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the State during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire.

He was adjudged in contempt by a State court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins* v. *United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."

Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

"The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The attorney general has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the attorney general to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the attorney general's investigation.

Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the State and, hence, that the liberties of the individual should prevail.

Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the State's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says:

"The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation-of-power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities.

"Under these circumstances, the conclusion of the Chief Justice that the vagueness of the resolution violates the due-process clause must be, despite his protestations, a holding that a State legislature cannot delegate such a power."

PUBLIC-EMPLOYMENT CASES

There are many cases involving public employment and the question of disqualification therefor by reason of Communist Party membership or other questions of loyalty.

Slochower v. Board of Higher Education, 350 U.S. 551, is a well-known example of cases of this type. Two more recent cases, Lerner v. Casey, and Beilan v. Board of Public Education, both in 357 U.S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness.

Lerner was a subway conductor in New York and Beilan was a public-school instructor. In each case the decision was by a 5-to-4 majority.

ADMISSION TO THE BAR

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element on the subject with which this report is concerned.

Konigsberg v. State Bar of California, 353 U.S. 252, seems to us to reach the high-water mark so far established by the Supreme Court

in overthrowing the action of a State and in denying to a State the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the State highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the State highest court of "whether or not it did in fact pass on a claim properly before it under the due-process clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable State statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the National or State Government by force or violence. The committee of bar examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in Dennis v. United States, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions, "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269), would not support such an inference either.

Meaning of Refusal to Answer

On the matter of advocating the overthrow of the National or State Government by force or violence, the Court held—as it had in the companion case of Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, decided contemporaneously—that past membership in the Communist Party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the Government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the bar committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but—at 353 U.S. 270—said that "prior decisions by this Court indicated" that his objections to answering the questions—which we shall refer to below—were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California bar simply because he refused to answer questions."

In a footnote appended to this statement it is said, 353 U.S. 259:

"Neither the committee as a whole nor any of its members even intimated that Konigsberg would be barred just because he refused to answer relevant inquires or because he was obstructing the committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

A "Convincing" Dissent

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State bar investigating his application. 353 U.S. 284–309. Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party.

The bar committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party.

We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the committee was concerned with its duty under the statute "to certify as to this applicant's good moral character"—p. 295—and that the committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee—p. 301—and that the committee, in passing on his good moral character, sought to test his veracity—p. 303.

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the bar committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto* a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the bar examiners."

Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to Konigsberg, we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist

against answering certain questions. These might have served to test his veracity at the committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point—pp. 270–271—it says that the committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another—p. 273—it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an independent bar."

The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the States free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

Avoiding "a Test of Veracity"

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a State is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar.

The power left to the States to regulate admission to their bars under Konigsberg hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of Konigsberg by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-State relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment—p. 312—says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The Lerner and Beilan cases, above referred to, seem to indicate some recession from the intimations, though not from the decisions, in the Konigsberg and Slochower cases. In Beilan, the schoolteacher

was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

STATE ADMINISTRATION OF CRIMINAL LAW

When we turn to the impact of decisions of the Supreme Court upon the State administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States.

There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect.

Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in Moore v. Michigan, 355 U.S. 155.

In the Moore case, the defendant had been charged in 1937 with the crime of first-degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education—only the seventh grade—and as being of rather low mentality.

He confessed the crime to law-enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered, he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed

About 12 years later the defendant sought a new trial, principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned.

The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court.

The Supreme Court of the United States reversed.

The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the State to prove its case against him—saying the evidence was largely circumstantial—by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor.

The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the State might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is Lambert v. California, 355 U.S., decided Dec. 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles.

Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined.

The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of the process of law.

"A Deviation From Precedents"

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of State and federal statutes which imposed criminal penalties for nonfeasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas-corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas-corpus matters because what is probably the most far-reaching decision of recent years on State criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas-corpus case. That is the case of Griffin v. Illinois, 351 U.S. 12, which arose under the Illinois Post Conviction Procedure Act.

The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a State permits an appeal by those able to pay for the cost of the record or its equivalent, then the State must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings.

Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in Griffin v. Illinois are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that, in order to give full effect to the doctrine of Griffin v. Illinois, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The Griffin case was very recently given retroactive effect by the Supreme Court in a *per curiam* [by the court as a whole] opinion in Eskridge v. Washington State Board of Prison Terms and Paroles, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge.

A statute provided for so furnishing a transcript if "in his (the trial judge's) opinion, justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial.

The defendant then sought a writ of mandate from the Supreme Court of the State, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed.

In 1956 he instituted habeas-corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in Griffin, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself.

Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied

to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in Griffin that it should not be retroactive. He did not participate in the Eskridge case.

Just where Griffin v. Illinois may lead us is rather had to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the nonmeritorious appeals eliminated.

One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions.

Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the State.

Whether this latter approach, which we may call "screening," would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U.S.C.A. contains a sentence reading as follows: "An appeal may not be taken *in forma pauperis* [as a poor man] if the trial court certifies in writing that it is not taken in good faith."

This section or a precursor thereof was involved in Miller v. United States, 317 U.S. 192, Johnson v. United States, 352 U.S. 565, and Farley v. United States, 354 U.S. 521, 523. In the Miller case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that, in order that such a review might be made by the Court of Appeals, it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought.

Similar holdings were made by *per curiam* opinions in the Johnson and Farley cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in Johnson, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The Eskridge case, above cited, decided on June 16, 1958, rejected the screening process under the State statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the Eskridge case thus seems rather clearly to be that, unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, States, such a classification would doubtless require legislative action. In the Griffin case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant

based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some State appellate courts under the flood of appeals which may be loosed by Griffin and Eskridge is not a reassuring prospect. How far Eskridge may lead and whether it will be extended beyond its facts remain to be seen.

CONCLUSIONS: THE JUSTICES SUM UP

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend toward increasing power of the National Government and correspondingly contracted power of the State governments.

Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central Government and of the plentitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong State and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that, in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are affected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. Here we think that the over-all tendency of decisions

of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly.

There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of Justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the tole of policy maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role. We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights.

We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy.

We further believe that, in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of State action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

"Doubt" in Recent Decisions

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years. See the tables appended to Mr. Justice Douglas's address on *"Stare Decisis,"* 49 Columbia Law Review 735, 756–758.

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the Court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so.

It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.

The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield

to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." Quoted in 31 "Boston University Law Review" 43.

We believe that what Mr. Root said is sound doctrine to be followed toward the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this Committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course.

Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the State appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe.

And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

* * *

Report on High Court: Who Wrote It, Who Approved It

These 10 State justices were members of the committee which drew up the report on the Supreme Court:

Frederick W. Brune, Chief Judge of Maryland, chairman.
Albert Conway, Chief Judge of New York.
John R. Dethmers, Chief Justice of Michigan.
William H. Duckworth, Chief Justice of Georgia.
John E. Hickman, Chief Justice of Texas.
John E. Martin, Chief Justice of Wisconsin.
Martin A. Nelson, Associate Justice of Minnesota.
William C. Perry, Chief Justice of Oregon.
Taylor H. Stukes, Chief Justice of South Carolina.
Raymond S. Wilkins, Chief Justice of Massachusetts.

Also voting to approve the report were chief justices from 26 other States: Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Washington, Wyoming.

Voting against the report were chief justices from seven States, one territory: California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, Hawaii.

Abstaining: Nevada, North Dakota.

Not present: Arkansas, Connecticut, Indiana, Puerto Rico.

[Editorial from the Evening Star, Washington, D.C., June 14, 1967]

DR. KING'S CONVICTION

The Supreme Court's majority opinion affirming the conviction of Dr. Martin Luther King Jr. and seven other ministers for contempt of court after they had deliberately violated an injunction issued by a Birmingham judge in 1963 rests upon what strikes us as a sound legal doctrine.

Speaking for the court Justice Stewart said: "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives and irrespective of his race, color, politics or religion. This court cannot hold that (Dr. King and the others) were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. * * * Respect for judicial process is a small price to pay for the civilizing hand of law which alone can give abiding meaning to constitutional freedom."

Justice Stewart was joined in this by Justices Black, Harlan, White and Clark, who has now stepped down from the bench. The dissenters were Chief Justice Warren and Justices Brennan, Douglas and Fortas.

In three opinions they bitterly attacked the majority holding. The details cannot be spelled out in this space. But the essence of the dissents was that the majority by affirming the convictions for violating the injunction, had in effect closed the door to a challenge of a "patently" unconstitutional Birmingham ordinance regulating parades and street demonstrations. The majority, of course, thought otherwise. They said the defendants should have challenged the legality of the injunction before willfully defying it.

We would like to think that the principle announced by the majority would be controlling in the future. But this would be a very dubious assumption in view of the President's nomination of Thurgood Marshall to replace Justice Clark. When a suitable case comes along after the Solicitor General takes his seat on the court, there is a high probability that the holding in the case of Dr. King will be overruled by a new 5 to 4 decision.

[Editorial from the Evening Star, Washington, D.C., July 13, 1967]

MR. MARSHALL'S NOMINATION

A few years ago, the appointment of a Negro to the Supreme Court would have been a sensational, not to say controversial, development. President Johnson's nomination of Thurgood Marshall, however, has produced scarcely a ripple of excitement. This is a measure of our national progress toward maturity, and cause for modest gratification.

The merit of this particular appointment is another question.

There has been some hope, though not much, that the President, in choosing a successor to Justice Clark, would try to bring the Court

into better balance. His nomination of the Solicitor General, however, suggested that this hope can be filed and forgotten.

No Supreme Court Justice can be fitted neatly into any category. Occasionally the most liberal or the most conservative, using this term in its relative sense, will jump the tracks. On the whole, however, Tom Clark was a "swing man," sometimes siding with one bloc, sometimes with the other. If any descriptive term is applicable to his service on the bench, it is that he has been a moderate.

We do not think this can be said of Thurgood Marshall, although few things in this life are more hazardous than trying to predict what positions a man will take after he joins the court. Our guess is, however, that Marshall generally will join the "liberal" wing consisting of the Chief Justice and Justices Douglas, Brennan, and Fortas. If so, the "liberals" will be in firm control, and this is considerably less than reassuring with respect to many of the vital areas of public interest that are affected by the court's rulings.

[From the Evening Star, Washington, D.C., July 21, 1967]

MARSHALL LEAVES QUESTIONS OPEN

(By Dana Bullen)

Thurgood Marshall's reluctance to discuss current criminal law issues at the hearing on his nomination to the Supreme Court leaves this side of his future judicial personality something of a question mark.

Most observers feel he will be liberal-minded, possibly joining Chief Justice Earl Warren and Justice William J. Brennan Jr. on the central side of the court's liberal bloc. Marshall's years of work championing equal rights for Negroes supports this view.

On certain criminal law issues, however, the signals are confusing.

As judge of the 2nd U.S. Court of Appeals in New York prior to becoming U.S. solicitor general, Marshall dealt infrequently with deep criminal law issues. As solicitor general, he was the government's advocate, and it is unclear which views also were personal ones. At the Senate hearings, many such questions went unanswered.

* * *

The main clues given the senators were, first, that Marshall, the first Negro ever named for the Supreme Court, insists that efforts to fight crime stay within constitutional limits and, second, that a brief filed by him in the Miranda group of confession cases contained personal as well as government views.

The first statement probably will not greatly encourage conservative-minded senators who seem to think that the current Supreme Court shapes the Constitution to fit the cases it finds before it.

Marshall, himself, feels as do most constitutional scholars that the Constitution was meant to be a "living document."

Asked by Senator Sam J. Ervin Jr., D-N.C., what he meant, Marshall said that the framers intended that the Constitution's provisions should be interpreted and applied as of the particular time that a question presents itself.

Such a view permits a flexibility that supporters of the present Supreme Court believe is essential, but that critics of the justices deplore.

The 59-year-old nominee's second statement, however, started a small run on Justice Department and Supreme Court file rooms to find out just what the Justice Department's brief on the confession question said.

* * *

In light of Marshall's statement that it reflected his personal views, too, it makes interesting reading.

"We start from the premise," the brief stated, "that it is essential to the protection of society that law-enforcement officers be permitted to interrogate an arrested suspect."

"An inflexible constitutional rule turning on the presence or absence of counsel or on the recitation or omission of a warning may be easier to apply, but we believe it will, more often than not, cast out the baby with the bath," it said.

Generally the position taken by Marshall before the court was that the totality of the circumstances, rather than any single factor, should be decisive in determining whether a confession is usable.

The Supreme Court, of course, went beyond the government's approach making effective warnings about the right to silence and to counsel the key to police use of statements made by suspects.

With the new ruling on the books, it now is unlikely that any new justice could, or would, launch a drive to overturn it.

Marshall's brief, then, may merely indicate greater awareness of law enforcement problems and needs than critics of the court feel liberal-minded justices currently are displaying.

Even this, though, could be important. The number of 5-to-4 decisions by the court underscores the impact a single justice can have.

If it is hazardous to try to predict how a justice will turn out, then it is doubly so when, as in Marshall's case, the signs point in conflicting directions.

While a judge on the 2nd U.S. Court of Appeals some of Marshall's opinions reflected a liberal image that may clash with the language in his brief for the government in the Miranda cases.

In one decision, Marshall virtually applied the 5th Amendment's guarantee against double jeopardy to state proceedings although the Supreme Court itself has yet to go so far.

* * *

It was Marshall, too, who as solicitor general last year urged the high court to clear the way for new trials in cases in which government evidence was based upon bugging.

The one thing that is certain, it seems, is that a justice does not shed the views of a lifetime when he mounts the bench—whatever those views may be.

Marshall won the 1954 school desegregation case as counsel for the NAACP Legal Defense Fund.

The instincts developed during his 23 years in the legal battle for equal rights for Negroes surely will assert themselves in some way on the court even though strictly civil rights cases are becoming less frequent now.

[From the Evening Star, Washington, D.C., June 23, 1967]

MARSHALL APPOINTMENT TO COURT GREETED QUIETLY

(By Clayton Fritchey)

In the light of the surprisingly mild reaction to Thurgood Marshall's appointment to the Supreme Court, his confirmation by the Senate now seems a foregone conclusion. There has not been much grumbling even in the South; and in the Negro community the applause, while generous, has not been deafening.

The unruffled acceptance of what would have been a breath-taking appointment a few years ago, is impressive proof of how much the racial climate has changed in the United States; it also is another demonstration of President Johnson's adroitness in conditioning the public for what he intends to do. He made the choice of Marshall seem obvious. It was almost taken for granted before it happened.

On balance, the President is not likely to gain or lose much politically by the appointment. Certainly such criticism as there has been is nothing for him to worry about. It comes down to two complaints. One is that all appointments to the court should be made on "merit," irrespective of race or religion; the other is that Marshall is not a legal scholar.

As to the first, has there ever been a time when race was not a factor? For 170 years the court has deliberately been all white. Johnson's appointment of Marshall is not a case of introducing race as a consideration, but an effort to break away from it, and eliminate it as a bar to serving on the court. For much of its long history, the court has been a WASP (White Anglo-Saxon Protestant) institution, and it still is to a large extent.

As to Marshall's legal distinction, this is raised against nearly every appointee, but the new justice's experience as solicitor general and circuit court of appeals judge gives him a legal background superior to most of his new colleagues at the time they joined the court.

When the novelty of Marshall's appointment wears off, interest will begin to focus on the effect it will have on the future trend of the court, for there is little doubt that it is going to change the delicate and often unpredictable balance ot the last few years.

The day before Marshall was named, the court closed out its present session in an extraordinary flurry of 5–4 decisions. Generally, especially in civil rights and civil liberties cases, Warren, Black, Douglas and Fortas come down on the liberal side. Retiring Justice Tom Clark on occasion voted with them, but frequently not.

Many appointees have surprised even their best friends after going on the court, so it is hazardous to anticipate how any new member will act. On the basis of past performance, however, it seems certain that the liberal bloc will now have a consistent new ally. Certain types of cases that have recently commanded a 5–4 conservative majority, will in the future probably go the other way by 5–4.

In recent decisions the liberal bloc managed a 5–4 majority by picking up a vote from Clark in one case and from White in another. But from now on there will probably be a built-in liberal majority. Since Black, White and Stewart, swing over to the liberal side on close cases from time to time, there are not likely to be many conservative rulings in the foreseeable future.

Certainly the Rev. Martin Luther King and eight other clergymen might not be going to jail if Marshall had been on the court last week when it upheld contempt convictions of the ministers for their part in desegregation demonstrations in Alabama. Tom Clark cast the deciding vote in this 5–4 decision.

Every new appointment inspires nostalgic longings for the day when the court was filled with learned, objective justices cooly expounding the law free of any personal point of view or any personal feelings. Like Camelot, there never was such a court, and probably never will be. Maybe it is just as well.

[From the Evening Star, Washington, D.C., June 18, 1967]

MARSHALL'S APPOINTMENT UPSETS COURT BALANCE

(By James J. Kilpatrick)

The nomination of Thurgood Marshall to the Supreme Court has produced cries of jubilation within the liberal left. On the conservative side of the fence, the prospect produces only a sharp dismay. Where goes the Constitution now?

The big news in Marshall's nomination, of course, is that he is the first Negro ever to be named to the court. In the larger view, the matter of his race is immaterial. The overriding fact is that in choosing Marshall to replace the retiring Tom Clark, President Johnson deliberately has moved to upset the rough balance of liberalism and conservatism that recently has prevailed upon the high tribunal. Next term, the forces of judicial restraint will be represented only by Harlan, Stewart, and White, with an occasional vote from Black. The judicial activists will be in full control.

To either view—conservative or liberal—the consequences of this replacement cannot be emphasized enough. When the founding fathers created the Supreme Court in the Constitution of 1787, it was widely supposed that the court always would be the weakest branch of the central government. The driving force of the court's first Mr. Justice Marshall—Chief Justice John—changed all that. By a process of evolution, culminating dramatically in the Warren Court, the tribunal has become the most powerful authority in the whole of our federal system. Its members, serving for life, are in a commanding position to shape national policies as they please. These days, they often are pleased to turn the Constitution into wax.

Nothing that is said here is intended as criticism of Thurgood Marshall, the man. He is an immensely attractive fellow, as charming as his predecessor of 150 years ago. During a decade of bitter litigation on civil rights issues, Southern attorneys developed an abiding respect and affection for him. At one time, it might have been possible to oppose his nomination by reason of Marshall's total concentration on the narrow field of Negro rights, but his service on the United States Second Circuit and his experience as Solicitor General have removed that objection. Beyond cavil, he is qualified for the high court—more qualified, in truth, than many of his predecessors.

Neither is this intended to say that Clark was a wholly consistent conservative on the bench, or that members of the high court in every case follow predictable lines. Clark had his activist relapses,

as in the reapportionment cases; he was not above using his high office to vent his personal spleen, as in the Toilet Goods Association case of May 22. Most judges jump the philosophical traces now and then.

Nevertheless, the briefest glance at key cases of this past term will make the point.

In Adderley v. Florida, Clark was one of five who voted to sustain the convictions of 32 Negro students who undertook to trespass upon the Leon County jail in the name of civil rights. The opinion put a brake on some of the excesses of racial demonstrations. How would Marshall have voted in that case?

This past Monday in Walker v. Birmingham, Clark was one of five who voted to sustain the conviction of Martin Luther King for putting his own view of the law above the order of a court. Would Marshall have voted to send Martin Luther King to jail?

In Fortson v. Morris, Clark was one of five who upheld the power of the Georgia legislature to name a governor when no candidate obtained a majority in the popular election. Nothing in the Fourteenth Amendment, said the majority, prevents a state from so ordering its own affairs. But Marshall's whole record demonstrates a doctrinaire view of the Fourteenth; he reads into "equal protection" all sorts of provisions the framers of that amendment never intended.

In Cooper v. California, and again in McCray v. Illinois, Clark was one of five who voted to strengthen the hand of police officials in securing evidence of crime. The two decisions served to bring some common sense back to the law of Fourth Amendment searches. How would Marshall have voted in these critically important cases? It is a fair surmise that he would have voted with Warren, Douglas, Brennan and Fortas to reverse.

What the court and country will be getting in Marshall will be a more congenial Fortas, a less truculent Goldberg, a more disarming Brennan. The appointment is a great tribute to Marshall's own skill and industry; he is the grandson of a slave, the son of a Pullman waiter. No critic would wish to take away from the heartwarming success story that came to its climax Tuesday. All the same, in any conservative view of the workings of the court, the nomination is something worse than net no-gain. This was bad news—almost disastrous news—and we shall be living with it for the next ten years at least.

[From the Evening Star, Washington, D.C., June 16, 1967]

Why Not a Woman on High Court?

(By David Lawrence)

Theoretically, when a vacancy occurs among the nine justices of the Supreme Court of the United States, the President should ask the American Bar Association and the governors of the states to give him privately the names of two or three persons who are best qualified for that office. Instead, one name is submitted to the bar association by the Department of Justice for each vacancy, to ascertain if there is anything unfavorable that can be cited. Before making his selection, a President nowadays looks around for a man of integrity and ability

who happens also to be suitable politically—but the country rarely gets the best-qualified men with judicial experience.

However satisfactory the record of Thurgood Marshall, the new appointee, may be, President Johnson could have found at least a dozen men on the federal bench who are better equipped to sit on the Supreme Court of the United States. Johnson, of course, knows what the political customs are. To satisfy blocs of voters, there apparently has to be on the high court representatives of the Catholic, Protestant and Jewish faiths. It used to be that Presidents took account also of geographical factors and tried to equalize the number of justices from different parts of the country.

Significant as is the appointment of "the first Negro"—as the headlines have just emphasized—to membership on the Supreme Court, many people are asking why no Negro was appointed before. An even more pertinent question is: Why hasn't a woman been appointed to the Supreme Court of the United States?

There are many women who have served on the bench in federal and state courts, and have made excellent reputations. Women have been elected as governors and to the Senate and the House of Representatives, and have made notable contributions to public service. About 35 years ago, Frances Perkins became the first woman member of the President's cabinet. If the failure heretofore to appoint a Negro has been a discrimination, it may also be argued that the absence of a woman on the highest court is a kind of discrimination, too.

Thurgood Marshall was for many years general counsel for the Advancement of Colored People, and played a leading role in winning the school-desegregation cases before the Supreme Court in 1954. He also served on the U.S. Circuit Court of Appeals for three years before coming to the Department of Justice as solicitor general in 1965.

While Marshall will doubtless be confirmed by the Senate, the real concern among lawyers is not related so much to his possible participation in cases involving "civil rights" as to the question of where he will veer toward the group on the court which believes in an unwritten constitution rather than toward those who want to preserve the Constitution as written.

This same issue has been plaguing the Supreme Court since President Franklin Roosevelt, 30 years ago, sought to have the membership of the high court enlarged so as to enable him to appoint men who would side with his views on public questions. While the "court-packing" move was defeated in the Senate, Roosevelt had an opportunity later, as vacancies occurred, to name to the Supreme Court nine justices, at least five of whom were of his own school of thought. Since then there have been some exceptions, but for the most part appointees have come from the ranks of those who believe that the Constitution can be rewritten at will by the Supreme Court.

Persons who know Thurgood Marshall's philosophy think he will furnish a surprise and will be found in the middle-of-the-road category. His decisions inevitably will attract a lot of attention.

Unfortunately, there are many who feel that Marshall was appointed solely because of his color and that the President, in effect, "discriminated" against some white men at present on the federal bench who might have been chosen. But if there is "discrimination," the realistic fact is that in the entire history of the Supreme Court

of the United States, no woman has ever been appointed. The women eligible to vote outnumber the men. Maybe they just haven't "demonstrated" enough!

[From the Washington Post, June 19, 1967]

MARSHALL TO THE COURT—CAN MODERATION SURVIVE?

(By William S. White)

All who value poise and objectivity in the Supreme Court—qualities already sadly and often absent from its decisions—must look with deep anxiety upon President Johnson's nomination of Thurgood Marshall to the high bench.

It is, of course, neither wise nor fair to impute as inevitablities certain attitudes to Thurgood Marshall even before he has put on his black robes. Still, the probabilities of the future can only be rationally estimated by the known and certain past. By this standard it is likely that Marshall's elevation will only aggravate an already profound imbalance by which an already disproportionate majority of liberal justices has for years been acting not as detached arbiters but as lawmakers, not as interpreters of the Constitution but as amenders of that Constitution to suit their own notions.

It is an interesting and even a stirring circumstance, to be sure, that Thurgood Marshall is the first Negro in history to reach the high court. So far as all this goes it is well and good. But all this is not the point. The point is not the color of Marshall's skin, which is irrelevant, but the cast of Marshall's mind. And thus far this has been the mind of an undoubtedly honest but also undeniably zealous liberal advocate, notably in civil rights, that is not the proper equipment for service upon a tribunal supposed to act in aseptic impartiality upon the grand issues of a Nation.

Before Justice Tom Clark retired from the court to make room for this appointment, moderate and conservative and tradition-respecting opinion in this country was on its best days rarely represented by more than four justices out of nine. Clark himself was no conservative as such. But he never automatically sided with those Justices who have steadily been destroying legitimate states' rights and legitimate police powers to deal with both ordinary crime and racial disorders.

Now, there is grave reason to fear that the old 5 to 4 steamroller which has in effect made new law and judge-dictated amendments to the Constitution, may rise to 6 to 3. The basically tradition-minded justices—John Marshall Harlan, Potter Stewart and Byron White, with an occasional assist from the venerable Hugo Black—are likely now to be even more lonely and even more powerless to halt an often patently emotional spirit of unchecked reformism which is casting aside those standards of an evenhanded justice, remote from the clamors of politics and the pressures of interest groups, which once distinguished the Supreme Court of the United States as the most lofty home of dispassionate justice in all the world.

No one argues, of course, that the court should be structured ideologically, with so many "liberals" confronting so many "conservatives" like some congressional committee partisanly divided between Democrats and Republicans. All the same, it is idle to pretend that

the court has not long since plunged hip-deep into politics. This being the reality there is every demand in simple fairness not to allow the "conservatives" to be totally overwhelmed.

Yet Marshall has been nominated and Marshall will be confirmed by the Senate. What has been done cannot be undone, nor should it undone at the human cost of denying an honorable man the approval of the Senate. Thus, the outcome must depend upon Marshall alone. He will have it in his power to drive civilized moderation and conservatism—not some mad "far-right-wingism"—right out of the ultimate hall of justice. Or, by self restraint and sensitive regard for fair play, he can become a voice calmly insistent upon hearing both sides of every story.

MINORITY VIEWS OF MESSRS. EASTLAND, McCLELLAN, AND THURMOND

We each concur in the views expressed by Senator Sam J. Ervin, Jr., on the nomination of Thurgood Marshall to be an Associate Justice of the Supreme Court of the United States.

We each expect to present further views on the floor of the Senate on this nomination.

JAMES O. EASTLAND.
JOHN L. MCCLELLAN.
STROM THURMOND.

ADDITIONAL MINORITY VIEWS OF MR. McCLELLAN

The crime menace is today the greatest internal threat to our Nation's security. It is reaching astronomical proportions. Accompanying this rising crime rate is a corresponding decline of respect for law and authority. It is my belief that a majority of the Supreme Court has materially contributed to the current lawless trend by going far astray in their interpretation and application of the Constitution in recent decisions that have favored the criminal to the injury of society.

The members of the Supreme Court are in a position to wield great power in their interpretation of the Constitution. There have been split decisions whereby the vote of one member of the Court has radically changed the "law of the land" that has served society well for many decades. The present philosophy of the Supreme Court seems to have as one of its chief aims the establishment of more and more individual rights for the criminal suspect.

I had been hopeful that Judge Marshall, or whomever the President nominated, would profess a philosophy substantially different from that espoused by a majority of the present Court. Unfortunately, nothing Judge Marshall has said during these hearings indicates that his views on the crime issue differ from those of the present majority of the Court. On the contrary, I am convinced he fully shares their philosophy. For this reason, and for the well-being and security of our country, I cannot vote for confirmation of Judge Marshall to serve as an Associate Justice of the Supreme Court.

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